Tambe Electric, Inc. and International Brotherhood of Electrical Workers, Local Union #86. Cases 3–

CA-21668-1 and 3-CA-21970-1

January 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On December 15, 2000, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. Associated Builders and Contractors, Inc. (ABC) filed a brief as amicus curiae.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions only to the extent consistent with this Decision and Order

At issue is whether the judge correctly found that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to consider and hire union applicants for electrician positions from June 16, 1998, through February 24, 2000. As we explain below, even assuming arguendo that the General Counsel met his initial burden under FES^3 and established that antiunion animus contributed to the decisions not to consider or hire the union appli-

¹ We grant the General Counsel's unopposed motion to correct inadvertent errors in the decision of the administrative law judge to the extent that the General Counsel moves to substitute "Thomas" Griffo for "Robert" Griffo at various places in the judge's decision. In light of our disposition of this case, we find it unnecessary to pass on the General Counsel's additional contention that the judge inadvertently omitted Robert Baker's name from par. 2(a) of the recommended Order and from the notice to employees.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found that Michael Tambe was "evasive and inaccurate" as to his asserted lack of knowledge of an ABC newsletter. In our view, even if Tambe knew of the newsletter, and even if that newsletter was antiunion, that would not establish the violation here. As noted below, we have assumed arguendo that antiunion animus contributed to the Respondent's actions.

The judge also found that Tambe was "evasive and false" as to his testimony concerning the number of journeymen whom he employed. However, as discussed below, the judge erred as to his definition of journeymen, and this colored his evaluation of Tambe's testimony. Accordingly, we do not adopt that evaluation.

³ FES, 331 NLRB 9 (2000), supplemental decision 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002).

cants, we find that the Respondent has met its burden of showing that it would not have considered or hired the applicants even absent their union affiliation. Accordingly, contrary to the judge, we shall dismiss the complaint.

Facts

The Respondent is an electrical contractor operating in the Victor, New York area. In May 1994, the Union began an organizing campaign among the Respondent's employees. Beginning in 1997, the Respondent's president, Michael Tambe, and union organizer, Michael Farrell, met periodically over lunch. During these meetings, Farrell presented Tambe with information concerning the benefits of the Respondent becoming a union contractor and Tambe maintained his reluctance to do so.

Unfair labor practice charges filed by the Union in Cases 3-CA-20687-1, 3-CA-20826-1, and 3-CA-20826–2 alleging a discriminatory layoff and refusals to hire were settled by a non-Board settlement agreement approved by Administrative Law Judge Martin Linsky on June 9, 1998.⁴ The settlement agreement, which contained a nonadmissions clause, provided that the Respondent would pay \$1000 to each of eight union applicants and to former employee Douglas Thorpe, who was alleged in the complaint to have been discriminatorily laid off. Additionally, the Respondent agreed to post a notice to employees stating, inter alia, that the Respondent would not refuse to consider or hire applicants because they are union members and would not tell employees that they were laid off because they signed a union authorization card.5

When considering applications for employment, the Respondent evaluated each applicant's skill level and experience, references, and whether they were previously employed by the Respondent. Primarily, the Respondent preferred to hire from the "bottom-up," i.e., hiring inexperienced or unskilled employees who would be eligible for enrollment in its State-certified apprenticeship training program. Employees enrolled in that program were considered "apprentices" under New York State's prevailing wage laws, which specified certain ratios of jour-

⁴ All dates hereafter are in 1998, unless otherwise specified.

⁵ On December 2, the compliance officer for Region 3 advised Judge Linsky that the Respondent had complied with the terms of the settlement agreement and, on December 9, the judge issued an Order dismissing the complaint and closing the case.

⁶ The Company's general hiring policies date back to 1994. Tambe testified that his hiring philosophy is to hire "from the bottom up" and that since 1991 he has primarily hired "people at the entry level." Tambe further testified that since 1990, in order to recruit entry level employees, the Company has had relationships with various educational programs. The Company began participating in the Statecertified apprenticeship program "around 1990."

neymen to apprentices among the work force of employers bidding on prevailing wage projects.

The Respondent's hiring procedure required that an applicant complete and submit an application during particular hours at its main office in Victor. Applications remained active for 30 days. After reviewing the applications, Michael Tambe would decide which applicants to interview based on the criteria described above and, after the interview, Tambe would decide whether to hire the applicant.

During the period at issue in this case (June 16, 1998, through February 24, 2000), a number of union members filed applications. All of the union members who applied during this period were journeymen electricians with at least several years of experience. None had been previously employed by the Respondent. None had been referred to the Respondent by an acquaintance of Tambe. The Respondent did not interview or hire any of the union applicants.

Consistent with its hiring policies, the Respondent hired 66 entry-level employees and only 5 journeyman-level employees. Every journeyman-level applicant hired either had worked for the Respondent previously or had been referred by a personal or professional acquaint-ance of Tambe.

Discussion

The Board in *FES*, supra, 331 NLRB 9, set forth its analytical framework for determining whether a respondent violated Section 8(a)(3) and (1) of the Act by failing or refusing to consider or hire job applicants because of their union activities or affiliation. Regarding discriminatory refusals to consider for hire, the Board stated:

[T]he General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

If the respondent fails to meet its burden, then a violation of Section 8(a)(3) is established.⁷

The Board in *FES* further held with respect to discriminatory refusals to hire:

[T]he General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied

455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring . . .; (2) that the applicants had experience or training relevant to . . . the positions for hire . . .; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. . . .

If the General Counsel meets his burden and the respondent fails to show that it would have made the same hiring decisions even in the absence of union activity or affiliation, then a violation of Section 8(a)(3) has been established.⁸

For the purposes of deciding this case we assume, arguendo, that the General Counsel has sustained his initial burden of proof under *FES*. We find, however, for the reasons that follow, that the Respondent has shown that it would not have considered or hired the union applicants even absent the applicants' union activities or affiliation.

1. Refusal to consider allegations

The Respondent asserts that its refusal to consider the union applicants was consistent with its legitimate preference for hiring entry-level employees. The judge found the Respondent's asserted preference for entry-level employees to be pretextual. For the following reasons, we disagree with the judge.

The Respondent contends that it maintained a preference for hiring entry-level employees in part because they are eligible to participate in a State-sponsored apprenticeship program and to be paid apprentice rates on prevailing wage projects. In concluding that the Respondent's preference for hiring entry-level, apprenticeship-eligible applicants was pretextual, the judge relied on a fundamental misunderstanding of the journeymanapprentice ratio required by New York State laws for prevailing wage jobs. The judge erroneously found that in order to be counted as a journeyman for purposes of the ratio, an employee must possess "journey working papers." This error led the judge to conclude that in order to achieve its stated goal of enrolling more apprentices in its State-sponsored apprenticeship program while maintaining the required journeyman-apprentice ratio, the Respondent actually needed to hire "additional journeymen with journey workers papers (such as the union

⁷ Id. at 15.

⁸ Id. at 12 (footnotes omitted).

⁹ The journeyman-to-apprentice ratio requires one journeyman for the first apprentice and then three journeymen for each apprentice thereafter. Stated otherwise, the ratio of journeymen to apprentices is 1:1; 4:2; 7:3, etc.

journeymen)." For this reason, the judge found that the Respondent's asserted preference for hiring entry-level employees rather than the experienced union journeyman applicants was pretextual.

The judge erred in two respects. First, there is no New York State requirement that journeymen have "journey working papers." Second, by erroneously imposing the "journey working papers" requirement on the definition of "journeyman," the judge undercounted how many of the Respondent's employees were journeymen and accordingly miscalculated the numbers of apprentices permitted under the ratio.

It is important to note that New York laws recognize only two categories of employees on prevailing wage projects: apprentices and journeymen. ¹⁰ An apprentice is defined as an employee enrolled in a State-certified apprenticeship program; ¹¹ there is no definition for journeyman. Thus, under New York law, an employer's journeymen would be all of its nonapprentice employees.

It is undisputed that among the Respondent's work force of approximately 80 employees, there were at most 4-6 employees enrolled in the State-certified apprenticeship program from June 16, 1998, through February 24, 2000. The Respondent required only 10–16 journeymen to maintain the proper ratio for that number of apprentices. Conversely, during that time period, the Respondent employed approximately 74–76 employees who were not enrolled in a State-certified apprenticeship program. These employees, regardless of their skill level, would be considered journeymen for purposes of the New York prevailing wage laws, and would allow for the employment of as many as 25-26 apprentices on a prevailing wage project while maintaining the required ratio. It is clear, then, that, contrary to the judge's finding, the Respondent did not need to hire more journeymen in order to maintain the journeymen-to-apprentices ratio. Because the judge's pretext finding was based on this flawed premise, we reject it.12

We further find that the Respondent's preference for hiring entry-level employees is a legitimate, neutral hiring policy.¹³ The Board has held that an employer may lawfully refuse to hire employees that it considers overqualified. See, e.g., Hartman Bros. Heating & Air-Conditioning, 332 NLRB 1343, 1344 fn. 9 (2000), enfd. 280 F.3d 1110 (7th Cir. 2002) (respondent lawfully refused to hire union applicant with 26 years of experience because it preferred applicants with less experience who were easier to train); Germinsky Electrical Co., 331 NLRB 1365, 1370-1371 (2000) (respondent lawfully refused to consider and hire union applicants, all of whom were journeymen, for nonjourneymen jobs because they would be overqualified for the work); Bay Control Services, 315 NLRB 30 fn. 2 (1994) (respondent lawfully refused to hire journeymen electricians because its primary need was to fill low-paying helper jobs and, based on past experience, respondent had policy against hiring overqualified employees). Accordingly, we find that the Respondent was entitled to rely on a preference for entry-level employees in deciding which applicants to consider for hire.

We recognize that the Respondent hired some experienced applicants. However, in doing so, it maintained a preference for those who were former employees of the Respondent or who were recommended by current employees, family members, or business acquaintances. The Board has found such referral policies to be legitimate employment practices as well. *Ken Maddox Heating & Air Conditioning*, supra, 340 NLRB at 44 fn. 4.

All of the union applicants were journeymen electricians with at least several years of experience and were therefore ineligible for enrollment in the Respondent's State-certified apprenticeship program. None of the union applicants provided references from any of Tambe's personal or professional acquaintances. Further, none of the union applicants were former employees of the Respondent. Because none of the union applicants met any of the Respondent's hiring criteria, we find that the Respondent has shown that it would not have considered them for hire even absent their union affiliation. See *Kanawha Stone Co.*, 334 NLRB 235, 236–237 (2001).

2. Refusal-to-hire allegations

Regarding the Respondent's alleged refusal to hire the union applicants, we find, as we stated above, that the Respondent maintained a legitimate and valid preference for hiring entry-level applicants who were eligible to

¹⁰ New York State Labor Law Sec. 220.

¹¹ New York State Labor Law Sec. 220[3].

¹² We also reject the judge's characterization of this defense as belated because the Respondent did not raise it until the trial before him. "There is no obligation in the law to tell applicants of the reason for rejecting them." *Little Rock Electrical Contractors*, 327 NLRB 932 (1999)

¹³ Member Liebman observes that the General Counsel did not argue that the Respondent's hiring preference or policy was "inherently destructive of important employee rights" within the meaning of *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). Accordingly, that theory is not before the Board and Member Liebman expresses no view as to the merits of that theory had it been raised by the General Counsel in this

case. Ken Maddox Heating & Air Conditioning, 340 NLRB 43, 44 (2003).

participate in the State-certified apprenticeship program and therefore eligible to work for apprentice level wages on prevailing wage projects. As the judge found, the vast majority of employees whom the Respondent hired during the period between June 16, 1998, and February 24, 2000, were entry-level employees. During the 14 specific time periods in which the judge found the Respondent's refusal to hire Farrell and other union applicants to be unlawful, only five of the applicants actually hired were journeymen employees. The remaining 66 hires were all entry-level employees. By contrast, all the union applicants were journeymen with at least several years of experience. Because the Respondent's preference for hiring entry-level employees is valid, and there is insufficient evidence of disparate treatment, we conclude, contrary to the judge, that the Respondent did not violate Section 8(a)(3) and (1) when it hired entry-level applicants rather than the union journeymen applicants.

Likewise, the five applicants hired who were not entrylevel employees met the Respondent's legitimate preference for former employees and those recommended by current employees, family members, or business acquaintances. Mark Ciaccia was recommended by the Respondent's employee Dave Osborn, as well as by two of Tambe's business contacts, Sam Milano and Ray Kenneth Rowlands was recommended by Rusty Dunn, one of the Respondent's foremen. Scott Miller and Joseph Palazzo both worked for the Respondent through a temporary employment agency for approximately 3 months and were then recommended for permanent hire by the Respondent's foremen. Robert Murphy was recommended by his uncle, Jim Kunzer, a business acquaintance of Tambe for many years. By contrast, the union applicants were neither former employees nor recommended by current employees, family members, or business acquaintances. Thus, we find that the Respondent's hiring of these employees rather than the union applicants did not violate Section 8(a)(3) and (1) of the Act.

3. Conclusion

For the foregoing reasons, we find that the Respondent has shown that its decisions not to consider or hire the union applicants were made in accordance with its lawful hiring policies and preferences. 14 Therefore, we conclude that the Respondent has not violated the Act as alleged.

ORDER

The complaint is dismissed.

Rafael Aybar, Esq., for the General Counsel.
David W. Lippitt, Esq., of Rochester, New York, for the Company.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. These consolidated cases were tried in Rochester, New York, on February 14–15, 28–29, March 1–2 and 27, 2000. The charges were filed December 11, 1998, and June 9, 1999 (amended November 29, 1999), and the complaints were issued March 31 and November 30, 1999, consolidated November 11, 1999, and amended at the trial.

On June 9, 1998—in the fifth year of the Union's organizing ("salting") campaign—the Company agreed in a settlement of earlier cases to post a notice that "WE WILL NOT fail and refuse to consider applicants for employment, or fail and refuse to hire applicants for employment, because they are members of a union."

Thereafter, between June 16, 1998, and February 2000, the Company accepted the applications (some submitted monthly) from a total of 30 union members who sought electrical work—usually at any level, from entry level to journeyman, and at the Company's wage rates. The Company filed the applications and refused to interview or hire any of the union organizers. Meanwhile, the Company hired a total of 71 new nonunion applicants.

At the trial, President Michael Tambe, who did all the hiring, belatedly advanced the Company's primary defense, never before mentioned, for refusing to interview or hire any of the union applicants. Although he was still hiring nonunion journeymen, he testified:

- (a) That he did not contact for interview or hire Union Organizers Michael Farrell, James Hynes, Gregory Post, or any of the individuals who applied with them, because "in building my company from the bottom up," the "people I lack are people that . . . I could put through an apprenticeship program. Some of those people will go into [a State-certified] apprenticeship program and this . . . will allow me [to work on prevailing wage jobs at apprentice rates and] be competitive when we get into prevailing wage work. . . . [Otherwise] I am losing a great opportunity to be competitive on a lot of jobs."
- (b) That "I couldn't use [the union journeymen as apprentices] on these prevailing wage jobs; therefore it would shrink the size of my company and the amount of people I could put in different positions on jobs."

The evidence indicates that this defense is unpersuasive. In fact, for the Company to employ additional apprentices to be eligible to work at apprentice rates on prevailing wage jobs, it must employ more journeymen with "journey workers papers."

Not only must each opening in the State-certified program be advertised (under the State's affirmative action law), but the State Department of Labor strictly enforces its requirement that the employer must have in its employ, in a ratio of three journey workers (journeymen with journey workers papers) for

¹⁴ Cf. *Zurn/N.E.P.C.O.*, 345 NLRB 12 (2005) (respondent's facially neutral hiring policy not a defense with respect to hiring decisions in which the policy was not followed).

each additional apprentice, to provide the apprentices adequate on-the-job training.

Because of the limited number of the Company's journeymen with journey workers papers—which are received only through participation in the Company's State-certified apprenticeship program or through completion of journeyman training in such programs as the State-approved IBEW apprenticeship program—enrollment in the Company's State-certified apprenticeship program has been limited to four or five apprentices.

As the evidence indicates, for the Company to have available additional apprentices eligible to work at apprentice rates on prevailing wage jobs, it was *required* to employ more journeymen with journey workers papers (such as the union journeyman applicants). Therefore, the Company's defense that it did not hire any of the 30 union applicants because they were journeymen is a pretext.

The Company admits that the 30 alleged discriminatees "made their union affiliation clear on their applications, with one exception" (Christopher Wheeler, who revealed union wages of \$27.55, \$21.50, and \$21.30 on his last four electrician jobs). President Tambe admits that the union applicants had "appropriate skills" for the jobs they applied for and that after "reviewing the applications that were submitted by the union members," he "made the decision not to hire or even interview any of them."

The primary issues are (1) whether the General Counsel has sustained his burden of showing that union animus was a motivating factor in the Company's decisions not to consider the union applicants for employment and not to hire them; (2) if so, whether the Company has sustained its shifted burden of showing that it would not have considered them for employment and would not have hired them even in the absence of their union affiliation; and (3) if the General Counsel has met his burden and the Company has failed to meet its burden, what remedies are appropriate for the violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).

On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, is an electrical contractor in the construction industry at its facility in Victor, New York, where it annually receives goods valued over \$50,000 directly from outside the State. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that International Brotherhood of Electrical Workers, Local Union #86 (the Union or Local 86) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Since Michael Tambe became the president and co-owner (with his wife) of the Company in 1983, he has done all the hiring and has operated the business as a nonunion contractor. He admits that to his knowledge, he has never hired a union member to work as a journeyman, with one exception. That was in September 1994, after Local 86 began it organizing "salting" campaign in May 1994. On that occasion, he rehired a former employee, Carmine Borelli (who then worked for 1 week), because of a commitment he had made before the employee joined the Union. (Tr. 214, 415–416, 426–427, 447–450, 603–605, 645–646; GC Exh. 3 pp. 2–3.)

Tambe admits that he has never hired a union member who has stated an intention of engaging in organizing (Tr. 475).

In 1988 the Company became a member of ABC (Associated Builders and Contractors). From 1993 to 1995 Tambe served as a member of the ABC executive board. (Tr. 428, 646–647). At the trial on February 29, 2000, he gave the following testimony about ABC, upon questioning by counsel for the General Counsel (Tr. 427):

- Q. [BY MR. AYBAR] And isn't it also true that the ABC is a national organization of nonunion employers who are opposed to becoming union shops?
- A. I wouldn't exactly say that Mr. Aybar. . . . The Associated Builders and Contractors is made up of certified public accountants, law firms, distributors, suppliers, and contractors. Surely you wouldn't consider certified public accountants or even distributors as having a union affiliation or a nonunion affiliation. [Emphasis added.]

On further questioning, Tambe claimed, "I really couldn't tell you" when asked, "To your knowledge is there any employer within the ABC organization that is a union employer?" When asked again, he admitted, "To my knowledge no." (Tr. 427–428). Still later he claimed, "It's not my opinion" that one of the ABC's goals is to keep unions from organizing nonunion contractors, and then claimed, "I don't know. Not to my knowledge." (Tr. 686.)

To the contrary, when later asked if he was familiar with an insurance policy provided "through the ABC" against liability for refusing to hire union members, he answered, "I believe there is salting insurance" (Tr. 484).

Tambe admitted that the Company receives ABC Today, a newsletter that ABC publishes. When asked if ABC speaks in those newsletters about how contractors can keep unions from organizing their companies, he first answered, "I'll be honest with you. I don't read most of these newsletters." He next answered, "I really don't know." (Tr. 686–687.)

When asked about the November 1998 issue of the newsletter, he testified, that "by looking at this, doesn't ring any bell that I didn't read it." The newsletter lists a number of its antiunion publications and has an article about the "salting" insurance (providing "either \$500,000 or \$1 million annual coverage for legal fees and backpay awards related to NLRB unfair labor practice charges"). (Tr. 690–691; GC Exh. 16.)

¹ The Company's unopposed motion to correct the transcript, dated May 22, 2000, is granted and received in evidence as R. Exh. 16.

This, as well as much of Tambe's other testimony during the trial, is evasive and inaccurate, reflecting adversely on his candor and credibility.

Union organizer Michael Farrell had a number of luncheon meetings with Tambe. Farrell recalled that the first of these meetings was in 1997, when he talked about the benefits of becoming a union contractor and Tambe "said that he wasn't interested in joining the Union, but that he wouldn't rule out doing something in the future." (Tr. 294–295.)

Farrell recalled meeting with Tambe three or four times after that, before and after the scheduled trial of three earlier cases on June 8, 1998 (in the fifth year of the organizing campaign). Tambe stated, "[H]e would not even consider doing anything further . . . while charges were pending." (Tr. 295.)

Tambe testified that he met with Farrell "I'd say at least half a dozen" times, that Farrell "wanted to do a job with me to prove to me that the Union could do a good job for us and I didn't think it was a bad idea" and "Maybe by the end of the year we'd do a job together" (Tr. 428–429).

On June 9, 1998, during the trial, the Company and the Union reached an agreement to settle all three pending cases. An administrative law judge approved a non-Board settlement, which the General Counsel opposed. Drafting of the settlement agreement, which contained a nonadmission clause, was completed "after we finally got everything resolved concerning the wording of the settlement," with the "paperwork going back and forth," and was finally signed by the Union on August 19 and by the Company on August 24, 1998. (GC Exh. 1F, attachments D pp. 76–77, and E; R. Exh. 1, attachment B; Tr. 83–84, 313–314.)

The settlement provided for the payment of \$1000 to each of eight union applicants and to Douglas Thorpe, whom the consolidated complaint alleged was discriminatorily laid off and told by Project Manager Mark Wise that the Company "had laid him off because he had signed a union authorization card" (GC Exh. 2Q p. 3, par. 6b; R. Exh. 1, attachment B; Tr. 620–624).

The notice to the employees, dated September 14, 1998, provided in part (R. Exh. 1, attachment C):

WE WILL NOT fail and refuse to consider applicants for employment, or fail and refuse to hire applicants for employment, because they are members of a union.

WE WILL NOT tell employees that they have been laid off because they signed a union authorization card.

As part of the settlement of the pending cases, as Farrell credibly testified, he and Tambe agreed to continue meeting to discuss what would be mutually beneficial, and Farrell promised not to file any more charges before letting Tambe know. But shortly after the Union signed the final draft of the settlement agreement on August 19, 1998, Tambe met with Farrell and, as Farrell further credibly testified, "[S]aid I had nothing to offer him, and he didn't see the benefit of us meeting anymore." (Tr. 296, 312–314.)

Although Tambe continued refusing to hire the union applicants, on November 16, 1998, the company counsel notified the Region that the Company "was in compliance with the terms of

the Settlement Agreement" (GC Exh. 1J, par. 14 p. 4). On December 2, 1998, the Region's compliance officer advised the judge that the Company "has fully complied with the terms of the Settlement Agreement which you approved on June 9, 1998," and on December 9, 1998, the judge issued an Order dismissing and closing the consolidated case (R. Exh. 1, attachments D and E; Tr. 85–86).

Two days later, on December 11, 1998, the Union filed a charge (GC Exh. 1A) alleging that the Company refused to hire and consider for employment union members Michael Farrell, James Hynes, and Gregory Post, apparently referring to their 13 applications dated from June 16 to November 9, 1998 (GC Exhs. 7(27A) to (38). On May 10, 1999, the General Counsel submitted a motion to the judge to revoke his approval of the settlement agreement (GC Exh. 1G). On May 24, 1999, the judge denied the General Counsel's motion, ruling that the new case (one of the cases in this proceeding) should be tried separately on its own merits (GC Exh. 1K; R. Exh. 1, attachment F).

On July 2, 1999, the Board issued an Order, denying the Company's motion to dismiss the allegations (in this proceeding) of "post-settlement unfair labor practices" (referring to the alleged refusals to consider for employment and to hire union members who applied after the June 9, 1998 settlement agreement). The Board ruled that "[a] determination of compliance with a settlement agreement does not bar litigation of post-settlement unfair labor practice complaint allegations," citing *Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397 (1978). (GC Exhs. 1F and R; R. Exh. 1, attachment G.)

B. Union Animus

1. Admission of project manager

Douglas Thorpe, who impressed me very favorably as a truthful witness, was in a BOCES cooperative program and worked full time in the summer of 1996. As he credibly testified on cross-examination, in 1997 he was going to school in the morning and working in the afternoon, when President Tambe called the job on March 28, told him there was no more work, and laid him off. (Tr. 637–638.)

In May 1997, as Thorpe further testified, he had a telephone conversation with Project Manager and Estimator Mark Wise. Believing himself to be a good worker and knowing there was more work, Thorpe was curious what had happened and asked Wise in the conversation why he had been let go. It was then that Wise admitted to Thorpe that "Mike Tambe had heard that I had signed a union representation card" and "did not want me working for him anymore because of that." (Tr. 632–633, 638–639.)

I discredit Tambe's denial that he told anybody he had laid Thorpe off because he had signed a union card (Tr. 667–670). I also discredit Wise's denial (Tr. 731).

Pointing out that Wise was employed by a union contractor when he testified on March 27, 2000, the Company argues in its brief (at 24) that "[h]e thus had no motivation to lie when testifying." Wise, however, was employed by the Company when he stated in his pretrial affidavit that he had never told Thorpe that Thorpe "had been laid off because Mike Tambe had learned that he might be joining the Union." When testifying, Wise was not contradicting this denial in his sworn September

12, 1997 affidavit, which was given in one of the earlier cases that were settled on June 9, 1998. (R. Exh. 15 p. 3.)

When testifying, Wise acknowledged that Thorpe had worked on one of his projects the summer before and "I was very pleased with Doug's work performance. He is an excellent person and I think an excellent prospect for electrician. . . . I would imagine that I did" convey that to President Tambe, "because most of the time if I see someone who is talented, I would voice an opinion." (Tr. 729, 737.)

The Company misquoted testimony in its brief (at 23) when stating that "Thorpe inconsistently testified as to when he signed a union card. He first testified that he joined the Union in June of 1997 (Tr. 632), but later testified that he had already *joined the Union* [emphasis added] when he talked to Mr. Wise in mid-May [Tr. 639]." To the contrary, Thorpe testified that when talking to Wise: "I had already signed [the union card]"—not "joined" the Union.

Former Union Organizer Robert Swetman credibly testified when it was that Thorpe signed the union card. Swetman testified that in January 1997, when Thorpe was a student in a BOCES program, an occupational type program, "He was with his BOCES class making application at the Union Hall for the apprenticeship program. . . Well, the entire class came in at the request of their teacher. . . . I definitely recommended that [Thorpe] apply to the apprenticeship program." (Tr. 241–242.) This testimony could explain how Tambe, who hired BOCES students, heard that Thorpe had signed a union card.

Having credited Thorp's testimony that Project Manager Wise told him that "Mike Tambe had heard that I had signed a union representation card" and "did not want me working for him anymore because of that," I infer that Wise's admission reveals that Tambe's union animus was well known in the Company's supervision.

As found, the consolidated complaint in the earlier cases (which were settled on June 9, 1998) alleged that Project Manager Wise "told an employee that [the Company] had laid him off because he had signed a union authorization card," and the settlement notice stated, "WE WILL NOT tell employees that they have been laid off because they signed a union authorization card."

It is well established that presettlement conduct can constitute "substantial evidence of union animus." *Special Mine Services*, 308 NLRB 711, 711 (1992), enfd. in pertinent part 11 F.3d 88 (7th Cir. 1993) (judge properly held that presettlement conduct evidenced "strong union animus"). I therefore find that Project Manager Wise's admission is evidence of union animus.

2. Refusal to hire union applicants after settlement agreement signed

As part of the settlement of the pending cases on June 9, 1998, as found, Tambe had agreed to continue meeting with Union Organizer Farrell to discuss what would be mutually beneficial and told Farrell that "[m]aybe by the end of the year we'd do a job together." But after the Union signed the final draft of the settlement agreement on August 19, 1998, Tambe told Farrell in a meeting that the Union "had nothing to offer

him, and he didn't see the benefit of us meeting anymore" (Tr. 296, 313–314).

According to Tambe (Tr. 429), he believed that the meeting was on July 1, 1998 (not after the Union signed the settlement agreement on August 19). Concerning what he told Farrell, he testified (Tr. 430–431):

- Q. [BY MR. AYBAR] So then at that time you told Mr. Farrell that the Union had nothing to offer the Company?
- A. I said at that time at that particular time I see nothing that the Union has to offer for me.
- Q. So in other words you were telling Mr. Farrell that you had no desire to hire him or any other union member that he may refer to your company for employment; is that correct?

A. I think I answered your question.

JUDGE LADWIG: Could you answer it again.

THE WITNESS: At that particular time I had no interest.

By Mr. Aybar:

Q. In hiring him or any members that he may have referred.

A. *That's correct*. [Emphasis added.]

Tambe's explanation was that after the court case (when the judge approved the settlement agreement on June 9, 1998), "I probably told Mike [Farrell] . . . I just want to be left alone. Maybe by the end of the year we'll do a job together." (Tr. 429.) But Farrell "kept his options open by filling out the applications. So I didn't see a good faith effort in that" and (Tr. 430):

I also didn't see a good faith effort when Mike would come in and fill out an application and he would ask to see a posted policy that had to be posted in my building according to the settlement agreement of the [settled] case. Quite frankly our building is not open for public display and I didn't see where that was any more than aggravated bashing of my people.

This testimony reveals that Tambe's meeting with Farrell could not have occurred on July 1, 1998. In the first place, from June 9 to July 1, Farrell had submitted only one application, on June 16 (GC Exh. 7(27A)). In the second place, the only document that had to be posted "according to the settlement agreement" was the notice to employees, which was not posted until September 14, 1998, over 2 months later. This was also after the late August meeting about which Farrell testified.

Even if Tambe had been sincere, when settling the pending cases, in telling Farrell that "[m]aybe by the end of the year we'll do a job together," that would mean that Tambe would hire a crew of union members to perform the work on a separate project, instead of hiring union applicants to fill openings to work with his nonunion employees and have access for organizing purposes.

Earlier, Tambe had explained (Tr. 426–427) that "I believe in the direction that my company is going and if it ain't broke don't fix it.... I feel that right now the direction that we're taking has been the best direction for my company" and "That would be correct," that "direction being a nonunion employer."

Thus, he had "no interest" in hiring Farrell "or any members that he may have referred" because, as he admitted (Tr. 442), he was aware that the union members intended to "engage in organizing activities."

By admitting that he had "no interest" in hiring Farrell "or any members that he may have referred" in the meantime, Tambe was admitting his discriminatory motivation for not hiring the union applicants.

In an obvious effort to offset the impact of this admission on Tambe's claim that "it's not my policy not to hire" members of Local 86 (Tr. 439), Tambe 2 days later gave a positive answer to a leading question by the company counsel. In its brief the Company relies on this answer to argue (at 20–21) that Tambe's statement to Farrell "reflected the fact that the union members who were filing applications with the Company did not fit the Company's general hiring needs for apprentice-eligible employees." (This is a belated defense, discussed below.)

Thus, Tambe testified (Tr. 673):

Q. [BY MR. LIPPITT] And then in terms of the general company's hiring practice of looking for entry level or apprentice employees, those [union journeyman applicants] would not fit the Company's needs, correct?

A. No.

Q. Was that reflected in your statement to Mr. Farrell at your meeting in July or August, that you had no interest in hiring [union] members, at that time, or members he referred?

A. That's correct. [Emphasis added.]

But when asked, "What was that conversation" he had with Farrell, Tambe omitted any reference to this defense (Tr. 673–674):

[W]e had . . . a nice conversation about what we could do to do a job together.

And, quite frankly, I told him, at that time, I didn't need anyone to come and work from his organization.... I believe our conversation started with Mike [Farrell] saying, Mike, what can we do to do a job together?

And I said, Mike, at this time, there's nothing we can do to do a job together. Maybe over the course of the year, we can get together and do a job together, and it might be fun. It might be very interesting to do a job together, to find out where the dollar values would fall.

But at that present time, I wasn't ready to do a job with the Union. . . . I think Mike asked if I would go see their apprenticeship program. . . . I believe that's the extent of our conversation.

JUDGE LADWIG: So that's all you can recall that was said?

THE WITNESS: Yes.

Thus, Tambe was willing to answer yes to the counsel's leading question, but was unable to relate anything that was said in his meeting with Farrell about that belated defense. I discredit Tambe's answer to the leading question.

I find that Tambe's admission that he had no interest at that time in hiring Union Organizer Farrell "or any [union] mem-

bers that [Farrell] may have referred," is strong evidence of Tambe's union animus.

3. Tambe's evasive and inaccurate testimony regard ABC

As found, since 1988 the Company had been a member of the ABC (Associated Builders and Contractors). President Tambe was serving, from 1993 to 1995, as a member of the ABC executive board when the Union's organizing ("salting") campaign began in May 1994. Undoubtedly, he was aware of ABC's antiunion policy.

Yet, as found, he denied agreeing that ABC "is a national organization of nonunion employers who are opposed to becoming union shops" and claimed, "It's not my opinion" that "one of the ABC's goals is to keep unions from organizing nonunion contractors." To the contrary, Tambe admitted knowledge of "salting" insurance provided "through the ABC" against liability for refusing to hire union members.

I find that Tambe's evasive and inaccurate testimony about his knowledge of ABC's antiunion policy not only reflects adversely on his candor and credibility, but also at least implies he was seeking to conceal his own union animus in refusing to hire any of the union applicants.

4. Belated defense for not hiring union journeyman applicants

a. Hiring practice

At the trial, President Tambe advanced a belated defense (a) that he did not contact for interview or hire Union Organizers Michael Farrell, James Hynes, Gregory Post, or any of the other union journeyman applicants, because "in building my company from the bottom up," the "people I lack are people that . . . I could put through an apprenticeship program. Some of those people will go into [a State-certified] apprenticeship program and this . . . will allow me [to work on prevailing wage jobs at apprentice rates and] to be competitive when we get into prevailing wage work. . . . [otherwise] I am losing a great opportunity to be competitive on a lot of jobs," and (b) "I couldn't use [the union journeymen as apprentices] on these prevailing wage jobs; therefore it would shrink the size of my company and the amount of people I could put in different positions on jobs." (Tr. 431–433, 463.)

The evidence is clear that this belated defense, never mentioned to the applicants or when settling the earlier cases, is inconsistent with Tambe's actual hiring practice. In addition, as discussed below, it is inconsistent with the fact that the Company was required to hire additional journeymen with "journey workers papers" before it could place additional apprentices in the Company's State-certified apprenticeship program to work on prevailing wage jobs.

Tambe's actual hiring practice is illustrated by the 40 new nonunion employees he hired in 1998, including students, but excluding former employees, relatives, and a part-time BOCES carpenter instructor (Keith Kranick) hired to work Saturdays and holidays. By the end of 1999, only 11 of the 40 employees remained on the payroll. Eighteen were terminated before the end of 1998, and 11 were terminated in 1999. (Tr. 485–486, 569–570; GC Exhs. 4A and B, 8(39), and 15; R. Exhs. 5 and 6.)

There was thus a very high turnover rate. In those 2 years, the turnover of these new employees was exactly 72.5 percent.

Two of the 40 new employees hired in 1998 were journeymen, hired as nonsupervisory foremen. They were Carl Anderson and Richard Harder, hired at \$22 an hour (Tr. 528; GC Exhs. 15(4) and (5)). Three others were hired as journeymen. They were Mark Ciaccia on July 27, 1998 (after the June 9, 1998 settlement), at \$15 an hour (Tr. 559–560; GC Exh. 8(27)), Ronald Farruggia at \$12 (Tr. 475, 508; GC Exh. 8(9)), and Kenneth Rowlands on September 2, 1998, at \$15 (Tr. 565; GC Exh. 8(34)).

Nonunion applicant Mark Perrin, hired June 17, 1998, at \$9.50 (after the June 9, 1998 settlement), was already in an apprenticeship program. He had been enrolled in a State-registered ABC apprenticeship program, working for a nonunion contractor (Tr. 543; GC Exh. 8(21)). He did not, however, enrolled in either the Company's State-certified apprenticeship program or in the Company's other apprenticeship program, which is not authorized by the State Department of Labor (R. Exh. 11)

A seventh new employee, Todd Blondell, was not fully prepared to be a journeyman, but Tambe hired him at \$12 an hour because he was "old enough to be responsible" and he "could have advanced [without apprenticeship training] a lot faster than other people." (Tr. 504–505; GC Exh. 8(5).)

All of the remaining 33 nonunion applicants were entry-level employees. Twenty-two were employed at \$6 an hour, and the remaining 11 were employed at \$6.50 to \$11 an hour. (GC Exhs. 4A and B, 8, 15(7); R. Exhs. 5, 7.)

None (except 2) of the 35 new employees hired in 1998 (excluding the 5 journeymen) enrolled and remained in either of the Company's apprenticeship programs. Devin Murray enrolled in the Company's unauthorized program in the fall '99 semester and in the spring '00 semester. Rick Sweazy enrolled in the unauthorized apprenticeship program in the fall '98 semester and in the State-certified program in the spring '99 semester (replacing John Holloway). A third new employee, Matthew Coccia, enrolled in the unauthorized program in the fall '99 semester, but did not remain in the program in the spring '00 semester. (R. Exh. 11.)

New employees are not hired directly into either of the Company's two 5-year apprenticeship programs. Employees must first serve a 3-month "trial" period, without benefits. After that, they are required to pay the full tuition of \$650 a semester (\$1300 a year) for the classroom instruction—one-half of which the Company pays if their grade is 80 or higher. (Tr. 461, 549.) As a result, most of the Company's new employees who remain employed do not enroll in an apprenticeship program. They continue to work without classroom instruction.

Tambe admits that "[t]here is a percentage of people that had never went to school and they came up through the ranks and just caught on without school," that some journeymen have not gone through an apprenticeship program, and "I have people that are making over \$22 an hour that have never gone through an apprenticeship program" (Tr. 468–469).

Citing President Tambe's testimony that Respondent's Exhibit 11 is "the enrollment of the people that I have in the apprenticeship program" (Tr. 661), the Company contends in its brief (at 5) that it "has numerous employees participating in apprenticeship training classes through the year." In fact, to the

contrary, a large number of the employees listed in that exhibit were not apprentices. Instead, the exhibit includes apparently the first page of a list of all employees who attended a 10-hour OSHA "Construction Safety and Health Training" class (R. Exh. 11 p. 2). That page lists 23 employees, 15 of whom were not apprentices enrolled in either the Company's State-certified apprenticeship program or its unauthorized apprenticeship program.

Tambe testified that about 40 percent of his employees were apprentices (Tr. 467, 698). To the contrary, the Company's payroll records (GC Exh. 4B) show that at the end of 1999, the Company had 80 employees performing electrical work, excluding relatives (Tr. 486). But instead of having 32 (40 percent of 80) apprentices, there were only 13 apprentices enrolled in the unauthorized apprenticeship program in the fall '99 semester (the same number of full-time employees enrolled in the fall '98 semester) and 4 in the State-certified program in both 1998 and 1999 (R. Exh. 11).

In fact, the enrollment in the spring '00 semester, which began January 18, 2000, reveals that very few of the new employees remain in either the State-certified program or the unauthorized program.

The Company's payroll records in evidence show that Tambe hired 71 new nonunion applicants from June 17, 1998 (after the June 9, 1998 settlement of earlier cases), until February 2000, at the time of the trial (GC Exhs. 4A and B, 8(14) and (21)–(99); Tr. 512–513). Among those 71, Tambe hired 37 of them from June 17, 1998, to July 15, 1999, when he hired nonunion applicant Richard Valvo (GC Exh. 4A and B, 8(21)–(64)).

In the spring '00 semester (of both apprenticeship programs), there remained only 10 apprentices in the unauthorized program. Of the 37 new nonunion applicants that Tambe hired from June 17, 1998, to July 15, 1999, only two of them were enrolled in the unauthorized program. They were Richard Valvo who was hired July 15, 1998, and Raviel Vega who was hired as a relative on April 21, 1999 (Tr. 571; GC Exh. 4B; R. Exh. 11). Seven had been hired between 1993 and 1997, and one (Devin Murray) was hired about June 2, 1998, before the June 9, 1998 settlement (GC Exh. 8(19)).

In the State-certified program only Rick Sweazy, hired June 30, 1998, and two other apprentices (Joseph Cone, employed since 1996, and John Peri, employed since 1997) had remained after Ian Miller completed his apprenticeship in the fall '99 semester. Miller left the Company on January 6, 2000. (GC Exh. 4B, 8(22); R. Exhs. 11, 12.)

Thus, Tambe's actual hiring practice of hiring only nonunion employees, most of whom were at the \$6 to \$11 entry level, does not support the Company's contention in its brief (at 4) that "[t]he Company's philosophy has been to hire from the 'bottom-up' by bringing in entry or apprentice-level employees and *training them through an apprentice program to become journeymen* [emphasis added]." Most of the new employees who remain continue working without any apprenticeship class-room instruction.

b. Requirement of more journeymen with journey workers papers

After President Tambe gave his belated defense for not hiring union applicants because they were journeymen, Lynn Allen, a longtime apprentice representative of the New York Department of Labor, testified. He revealed that journey workers (journeymen with "journey workers papers" obtained by completing an employer's State-certified apprenticeship program or such programs as the IBEW apprenticeship program) were required for giving on-the-job training to apprentices enrolled in an employer's State-certified apprenticeship program. (Tr. 704, 716–717.)

Regarding an individual employer's apprenticeship program, Allen testified that the State Department of Labor very much encourages participation in a State-certified program, because "It's the only vehicle by which a person can receive journey workers papers." Allen also revealed that the department requires that there has to be a ratio of "three additional journey people" for each additional apprentice in the program (after one journey person for the first apprentice). "So every time you add someone ... you need to find out how many journey workers there are within the company. It's very strict." He confirmed that the IBEW apprenticeship program is State-approved. (Tr. 709, 712, 716–718.)

An employer's State-certified apprenticeship program is a 5-year program, requiring 8000 hours of on-the-job training by journeymen with journey workers papers and 900 hours (180 each year) of classroom instruction. The Department of Labor strictly monitors both the on-the-job training and the classroom instruction. (Tr. 705–706.)

The Company does have a State-certified apprenticeship program, which was approved in 1991. When asked by company counsel how many apprentices were enrolled each year "on the average," Allen answered, "Four or five." (Tr. 712.) In 1998 and 1999 there were only four apprentices in the program (R. Exh. 11). Tambe admitted that "I believe I had no more than five at any one time in the State-certified apprenticeship program" (Tr. 462). The training of four apprentices requires 10 journeymen with journey workers papers (one for the first and three for each of the three other apprentices), and the training of five apprentices requires 13.

The Company introduced in evidence an obviously inaccurate printout of six apprentices in the Company's State-certified program on June 22, 1999 (Tr. 713; R. Exh. 12). One of the listed apprentices was John Holliday, who was no longer in the State-certified apprenticeship program on that date, having been replaced in the spring '99 semester by Rick Sweazy (R. Exh. 11). A second listed apprentice, Michael Long, was placed on the list by mistake. He was not an employee of the Company (GC Exhs. 4A and B). (The listed Ian Miller, who enrolled in 1995 and completed the 5 years of classroom training in the fall '99 semester, left the Company's employ on January 6, 2000, leaving only three apprentices in the State-certified program at the time of trial, which began February 14, 2000.)

Apparently relying on the inaccurate printout showing six apprentices, the Company contends in its brief (at 6) that it has had approximately "four to six" employees continually enrolled in this program. I reject the contention that there has ever been

more than four or five apprentices enrolled in the Company's State-certified program.

For the Company to enroll each additional apprentice in the State-certified program, there are two requirements. First, the opening must be advertised under the State affirmative action law under which, on an average, 50 percent of the apprentices accepted by the State come from outside (Tr. 329–333, 713–716; GC Exh. 12). Second, for each apprentice beyond the four or five, whether or not already an employee, the State Department of Labor requires that the Company have (besides the previous 10 or 13), three additional journeymen with journey workers papers.

The Company has a second apprenticeship program, which is not authorized by the State. It is also a 5-year program with the same classroom instruction, but neither the classroom instruction nor the on-the-job training is monitored by the State, and the Company does not require that the apprentices be trained with a ratio of three journey workers to one apprentice. The apprentices are not eligible to work on prevailing wage jobs at the apprentice rates, and upon completion of their apprenticeship, they do not receive journey workers papers. They are ineligible to train apprentices in the State-certified apprenticeship program. (Tr. 640–464, 549.)

So neither the journeymen trained in the Company's unauthorized apprenticeship program nor the Company's journeymen who "came up through the ranks" without going through an apprenticeship program, are eligible to meet the State Department of Labor's strict requirement that journeymen must have journey workers papers for training apprentices in the Company's State-certified apprenticeship program.

Instead of revealing the actual number of journeymen with journey workers papers the Company employed, Tambe gave an estimate of 40 percent of his field people were journeymen (based on his estimate of a "little over" 60 field people—not the 80 on the payroll at the end of 1999). He testified that "I would say" 60 or maybe even 75 percent of them went through "the program." (Tr. 467–469.) He then gave the following evasive answer (Tr. 469):

- Q. [BY MR. AYBAR] Now when you say that these individuals went through the program, are you referring to the State-certified program or another apprenticeship program?
- A. When you look at the apprenticeship program the way I do, it's all one program. They all get the same schooling.

Earlier, Tambe gave obviously false testimony. He first testified that "I bet I've retained 70 percent" of the journeymen who have gone through the program and have been certified." Then when asked how many of the people "who have gone through the certified program for five years" are now on his payroll, he answered: "I'd venture to say 15 to 20 that have stayed with me [emphasis added]." (Tr. 465.) If true, this large number of journeymen with journey workers papers, besides those already on the payroll, would permit the enrollment of more than four or five apprentices in the Company's State-certified apprenticeship program to work at apprentice rates on prevailing wage jobs.

Tambe was claiming that in the State-certified apprenticeship program, which was approved by the State in 1991 and which requires 5 years for an apprentice to complete, he would venture that 15 or 20 of the apprentices (including only the 70 percent who remained employed) had completed the program. Yet, as found, there were not more than four or five employees in the program at one time. Even if there were five employees enrolled in the program in 1991 and even if all five of them remained in training the required 5 years until the end of 1995 and and five apprentices replaced them in 1996, only the first five apprentices could have completed the program in the 8 or 9 years since 1991—not 15 or 20 (or a larger number if 30 percent who did not remain were included).

In fact, as found, there were four apprentices in the State-certified program in 1998 and 1999. One of them, Ian Miller, who enrolled in the program in 1995 and completed the 5 years of classroom training in the fall '99 semester, did not "stay with" Tambe. He left on January 6, 2000. Only four other apprentices could have completed the 5 years of training since 1991.

When asked at the trial on March 2, 2000, who are the current apprentices enrolled in the State-certified apprenticeship program (after Ian Miller was terminated January 6, 2000—leaving only three apprentices, Joseph Cone, John Peri, and Rick Sweazy—Tambe answered, "I don't know" and later added, "I don't believe we've put anybody else on. We will shortly. . . . I don't think it's imperative that it happens until September, because school is already in session." (Tr. 664, 698; R. Exh. 11.)

Because of Tambe's evasive and false testimony, the evidence does not reveal how many journeymen with journey workers papers the Company was employing at the time of trial. I note that in 1999, when there were four apprentices in the State-certified program, the Company terminated four journeymen. They were foreman Carl Anderson (employed 5/11/98), Foreman Romeyn Dunn (employed 9/9/96), journeyman Ronald Hart (employed 10/10/94), and journeyman Larry Masci (employed 8/23/99). (GC Exh. 4B.)

I infer that Tambe gave the above-quoted evasive answer, as well as the obviously false testimony, "I'd venture to say $15\ to$ 20" of the people "who have gone through the certified program for five years" have "stayed with me," because Company was not employing enough journeymen with journey workers papers to meet the State's strictly enforced requirement of a ratio of three journey workers to one apprentice for any more than four or five apprentices in the State-certified program.

Therefore, instead of Tambe refusing to interview or hire any of the union applicants because they were journeymen, he in fact needed more journeymen with journey workers papers before the State Department of Labor would permit the Company to enroll additional apprentices in the State-certified apprenticeship program.

The Company had no prevailing wage projects between March 4, 1998, and September 24, 1999, when it began work on one such project. President Tambe testified, however, that he plans to bid on a "very large" prevailing wage project. (Tr. 649; R. Exh. 7.)

The General Counsel contends in his brief (at 14) that Tambe's defense was advanced "as a pretext to conceal [the Company's] true unlawful intent to discriminate against union applicants on the basis of their stated intent to engage in organizing activities, if hired."

5. Concluding finding of union animus

In summary, there is evidence that President Tambe was motivated by union animus in refusing to consider the union applicants for employment and to hire them after the June 9, 1998 settlement of earlier cases, as follows:

- (a) After Tambe had laid off Douglas Thorpe purportedly for lack of work, Project Manager Mark Wise admitted to him that Tambe heard that Thorpe signed a union authorization card and did not want him working for the Company anymore.
- (b) Tambe told Union Organizer Farrell that "Maybe by the end of the year" they would do a job together, but after the union signed the final draft of the settlement agreement on August 19, 1998, Tambe told Farrell that the Union "had nothing to offer" and indicated he "had no interest" at that time in hiring Farrell "or any [union] members that [Farrell] he may have referred."
- (c) Although Tambe was a former member of ABC's executive Board and assuredly was aware of ABC's opposition to union organizing, he gave evasive and inaccurate testimony about his knowledge of its antiunion policy, evidently to conceal his own union animus.
- (d) Tambe advanced a pretextual defense when he belatedly contended at the trial that he did not hire any of the union applicants because they were journeymen, ineligible to be apprentices. To the contrary, Tambe needed more journeymen because the State Department of Labor required the Company to employ additional journeymen with journey workers papers (such as the union journeymen) before the Company could enroll more apprentices in its State-certified apprenticeship program, to have a sufficient number of apprentices available to work at apprentice rates on future prevailing wage jobs.

As found, even if Tambe had been sincere during the June 9, 1998 settlement of the pending cases on June 9, 1998, in telling Farrell that "[m]aybe by the end of the year we'd do a job together," that would mean that Tambe would be hiring a crew of union members to perform the work on a separate project, still denying them access to the Company's nonunion employees.

I find that Tambe was refusing to consider the union applicants or to hire them to fill openings to work with his nonunion employees, to prevent them from engaging in organizing activity. Thus, this was a "denial to employees of access to the work force because of their union activity or affiliation," preventing "the exercise by workers of full freedom of association and self-organization." *FES*, 331 NLRB 9 (1999).

I therefore find that Tambe was motivated by union animus when deciding not to consider the union applicants for employment and not to hire them. I discredit his claim that "it's not my policy not to hire" the union applicants (Tr. 439).

C. Union Journeymen Applied for any Available Position

Union Organizers Michael Farrell, James Hynes, Gregory Post, and all except 3 of the other 27 union journeymen (who applied after the June 9, 1998 settlement) were seeking any available positions and were willing to work for the Company's nonunion wages, or whatever the Company was willing to pay (Tr. 701; GC Exh. 7(27A) to (110)).

The three exceptions were Bryan Manzer, who applied for "Electrician" on January 11, 1999 (GC Exh. 7(46A)), Matthew O'Toole, who applied for "Journeyman Electrician" on March 3, 1999 (GC Exh. 7(59)), and Robert Swetman, who applied for "Electrician" on November 24, 1999 (GC Exh. 7(103). I disregard their applications and also the applications of Timothy Allen and Ray Cogan, former employees who were not in good standing (Tr. 692, 694–695).

President Tambe admitted that based on their applications, the Company was aware of the union applicants' union membership and affiliation and also admitted that they had "the appropriate skills" to perform the work (Tr. 442, 473). I note that earlier, the Company took the position that the application of Christopher Wheeler did not clearly show on its face that he was a union member, although it showed that he received union wages of \$27.55, \$21.50, and \$21.30 on his last four electrician jobs (Tr. 130–131; GC Exh. 7(69) p. 3).

Although Tambe testified that "it's a standard policy [for him] to interview everybody" that he hires (Tr. 422, 424–425, 540), he admitted that after reviewing the applications submitted by Farrell, Hynes, Post, and each of the union members who applied with them, he made the decision not to hire or even interview any of them (Tr. 431, 603). He gave conflicting reasons.

One explanation was "I take my business on a month by month basis" and "we have not had an opportunity where I have hired Mike [Farrell] or Jim [Hynes] or any union applicant in that 30-day period" (Tr. 431)—ignoring the fact that both Farrell and Hynes were submitting applications monthly. Two days later, in the Company's defense, Tambe repeated this purported reason, testifying that "[t]he reason for not hiring any of them were I take the applications on a 30-day basis" (Tr. 603).

In the meantime, however, he ignored this purported reason and advanced his belated defense—that he "lacked people that I can bring into my company and that I could put through an apprenticeship program" and "I couldn't use [the union journeymen as apprentices] on these prevailing wage jobs" (Tr. 432–433).

Thus, he was admitting that having an opening sometime in the 30-day period had no bearing on why he did not interview or hire any of the union applicants. His decision was already made not to interview or hire them, purportedly because they were journeymen. I agree with the General Counsel that this was "a pretext to conceal" his "intent to discriminate against union applicants on the basis of their stated intent to engage in organizing activities, if hired." I find that he was acting on the basis of union animus.

D. Shifting Hiring Policies

In July 1994 (2 months after the "salting" organizing began), the Company posted its "Hiring Policies" in a glass window by the front door. It remained there unchanged during the trial in February and March 2000, when President Tambe admitted that "I think maybe my hiring policy needs to be re-evaluated.... There's a lot of words in here to help protect me as an employer but a lot of it is unnecessary as the years in my company have gone on." (Tr. 119, 477–480, 488–489; GC Exh. 6.)

Contrary to rule 1 of the "Hiring Policies" stating that "[w]e hire applicants solely based upon merit" and rule 6, "including skills and ability to perform the work" (Tr. 419–420, 425), since the June 9, 1998 settlement of the earlier cases, Tambe has hired mostly entry-level employees, usually at \$6 an hour, with little or no electrical training or experience. As a result, there has been a very high turnover of new employees. As found, 29 of the 40 new employees hired in 1998 were terminated by the end of 1999—a turnover of 72.5 percent.

Rule 3 provides that "[a]ll Applications will remain on file for 30 days" and paragraph 6 provides that hiring decisions are based in part on "personal interviews," although Tambe has applied those rules only to nonunion applicants. As found, Tambe decided not to interview or hire any of the union applicants, without considering the applications being open for 30 days. The 30-day rule has served only to determine whether there were job openings during the 30 days after the union members filed their applications.

Rule 6 provides that "[w]e base our hiring decisions on a variety of factors, including . . . employment references to character and willingness to work." In practice, as discussed below, Tambe extended this provision for "employment references" far beyond "character and willingness to work."

I find that except for his reliance on "prior employment with the company" as a rule 6 factor in making hiring decisions, Tambe has taken shifting positions in his hiring practices to justify his refusing to hire any of the union applicants.

Unlike the clear evidence of union animus in the present case, there was "no direct evidence" or "any reasonable basis for implying" union animus in *Rondout Electric*, 329 NLRB 957, 967 (1999), upon which the Company primarily relies in its brief (at 9, 10, 12, 18, 24, 40, and 50) to show its refusal to hire union applicants was lawful. I therefore find that decision to be inapplicable.

E. Controlling Precedents

In FES, 331 NLRB 9, 12 (2000), the Board held (footnote omitted):

To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring . . . (2) that the applicants had experience or training relevant to . . . the positions for hire . . . and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is establish, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. . . .

. . . .

If the General Counsel meets his burden and the respondent fails to show that it would have made the same hiring decisions even in the absence of union activity or affiliation, then a violation of Section 8(a)(3) has been established. The appropriate remedy for such a violation is a cease-and-desist order, and an order to offer the discrimatees immediate reinstatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions, and to make them whole for losses sustained by reason of the discrimination.

The Board also held in *FES*, supra at 15 (footnote omitted):

To establish a discriminatory refusal to consider, pursuant to *Wright Line*, supra, the General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

If the respondent fails to meet its burden, then a violation of Section 8(a)(3) is established. The appropriate remedy for such a violation is a cease-and-desist order; an order to replace the discriminatees in the position they would have been in, absent discrimination, for consideration for future openings and to consider them for the openings in accord with nondiscriminatory criteria; and an order to notify the discriminatees, the charging party, and the Regional Director of future openings in positions for which the discriminatees applied or substantially equivalent positions.

Here, the Company admits that the union applicants had appropriate skills for the jobs they applied for, and the General Counsel has sustained his burden under *Wright Line* of showing that the Company was hiring and that union animus contributed to the decision not to hire union applicants. The General Counsel has also sustained his burden of showing that the Company excluded the union applicants from the hiring process and that union animus contributed to the decision not to consider the applicants for employment.

Whether the Company has sustained its shifted burden to show that it would not have hired the union applicants even in the absence of their union activity or affiliation is discussed below.

Concerning the Company's shifted burden to show that it would not have considered the applicants for employment even in the absence of their union activity or affiliation, the Company's defense for deciding not to interview them, refusing to consider them for employment—because they were journeymen not eligible to go through the apprenticeship program or to work as apprentices on prevailing wage jobs—was, as found, a pretext. Having failed to sustain its burden, I find that the Company violated Section 8(a)(3) and (1) of the Act.

F. Evidence of Hiring Decisions

1. In general

The issue is not whether the nonunion employees were "hired according to the Company's general hiring practice." The issue is whether the Company, which was motivated by union animus, has sustained its burden to show that it would not have hired the union applicants even in the absence of their union activity or affiliation.

For deciding that issue, it must be borne in mind the facts that (a) union members, who were fully qualified journeymen with journey workers papers, were applying for any positions that were available, from entry level to journeyman, (b) they were willing to work for the Company's nonunion wages, providing skilled, productive services, and saving the Company the expense of training the nonunion entry-level employees it was hiring instead, most of whom would not remain in the Company's employ, (c) the Company was excluding union applicants from the hiring process by refusing to interview them, and (d) the Company was required by the State Department of Labor to hire additional journeymen with journey workers papers (such as the union journeyman applicants) before it could enroll more than four or five apprentices in the Company's Statecertified apprenticeship program, to enable the Company to have available additional apprentices to work at apprentice rates on future prevailing wage projects.

Preliminarily, I find that in the circumstances of this case, President Tambe would not have hired union applicants in preference to certain nonunion applicants, even in the absence of their union activity or affiliation. Those nonunion applicants were relatives, former employees in good standing, summer help, part-time employees, and backhoe operators for excavation work (Tr. 485, 582), and nonunion applicants already working in a State-certified apprenticeship program, such as Mark Perrin (GC Exh. 8(21) p. 2) and Brian Blum (GC Exh. 8(74) p. 2) in the State-certified ABC apprenticeship program.

2. Analysis

Union members, applying since the June 9, 1998 settlement, are listed in 30-day periods, during which the Company was hiring and when the applications were supposed to remain open, but were not for them. Their names are shown in boldface, to distinguish them from the nonunion employees who were hired in those 30-day periods.

Exhibit	Name	Apply Date	Hire Date	Start	Pay
GC 7(27A) GC	Michael Farrell	6/16/98			
7(27B)	James Hynes	6/16/98			
GC 9(22)	Dial Curany	6/30/98	6/30/98	7/7/98	\$6
8(22) GC	Rick Sweazy	0/30/98	0/30/98	1/1/98	30
8(23)	Charles Coons	7/6/98	7/6/98	7/7/98	6
GC					
8(24)	Bradley Sollberger	7/14/98	7/14/98	7/16/98	7.50

Farrell cited in his application his 5-year IBEW electrical apprenticeship training and State certification and his skills in using all hand tools, power tools, hydraulic lifts, hydraulic

benders, and hand benders. He also stated he was "[w]illing to work from entry level to foreman position for whatever you are willing to pay." In turn, Hynes cited his certified IBEW apprenticeship training, his "[k]nowledge and use of heavy equipment, tools associated with electrical construction (benders, power, hand tools), lifts, bucket trucks," and being "Ready and willing to be a productive employee in any phase . . . from entry level to foreman."

The three nonunion applicants, Sweazy, Coons, and Sollberger, with no previous electrical training or experience, were hired full time at the entry level. President Tambe testified that Sweazy "knows my son-in-law Mike Russell," that Coons was a stepson of an employee, and that he started Sollberger at the higher \$7.50-entry rate because of Tambe's friendship with Sollberger's father (Tr. 546–548).

Coons was terminated less than 3 weeks later, on July 24, 1998, and Sollberger was terminated December 14, 1998. Sweazy, on the other hand, was enrolled in the Company's unauthorized apprenticeship program in the fall '98 semester and in the State-certified program in the spring '99 semester, replacing John Holliday, whose last apprenticeship class was in the fall '98 semester. (GC Exh. 4A; R. Exh. 12.)

I find that the Company has failed to sustain its burden of showing that it would not have hired Farrell and Hynes instead of Coons and Sollberger even in the absence of their union activity or affiliation. By hiring them, the Company would have had skilled, productive journeymen at no additional cost, would have saved training expense, and would have journeymen with the required journey workers papers to be eligible to provide on-the-job training for any additional apprentices enrolled in the Company's State-certified apprenticeship program to work at apprentice rates on prevailing wage jobs.

I find, however, that the Company has sustained it burden of showing that it would not have hired Farrell or Hynes instead of Sweazy, because of Sweazy's special qualifications.

Exhibit	Name	Apply Date	Hire Date	Start	Pay
GC 7(28) GC	James Hynes	7/15/98			
7(29) GC	Michael Farrell	7/15/98			
8(25) GC	Ryan Mykins	7/30/98	7/30/98	8/12/98	\$6
8(27) GC	Mark Ciaccia	7/21/98	7/27/98	7/28/98	15
8(28) GC	Steven Plum	7/28/98		8/10/98	10
8(29) GC	Patrick Stout	7/28/98	8/3/98	8/26/98	6
8(30)	Nicholas Holliday	8/13/98	8/13/98	9/21/98	10

This time, Farrell added in his application, "I would be a productive member to Tambe Electric & am willing to work for whatever pay & conditions you set." Hynes included his special qualifications, "18 years construction experience, can operate backhoe, loader, bucket trucks."

Four of the nonunion applicants, Mykins, Plum, Stout, and Holliday, with no electrical training or experience, were hired full-time at the entry level. Tambe testified that he hired Holliday upon the recommendation of his employee brother,

and that Holliday's heavy equipment skills was "just an extra plus"—ignoring Hynes' special qualifications (Tr. 561–562). Although Ciaccia was hired as a journeyman electrician and was recommended by employee David Osborn, by a residential electrician "that I do a lot of work with," and by the owner of a nonunion electrical contractor (Tr. 559–560), he had no electrical apprenticeship training and therefore did not have journey workers papers for training any additional apprentice in the State-certified apprenticeship program.

I find that the Company has failed to sustain its burden of showing that it would not have hired Hynes and Farrell during the 30-day period even in the absence of their union activity or affiliation, because by hiring them, the Company would have had skilled, productive journeymen at no additional cost, would have saved training expense, and would have journeymen with the required journey workers papers to be eligible to train apprentices to work at apprentice rates on prevailing wage jobs.

Exhibit	Name	Apply Date	Hire Date	Start	Pay
GC 7(30) GC	James Hynes	8/17/98			
7(31) GC	Michael Farrell	8/17/98			
8(31)	Andrey Krupenya		8/19/98	8/20/98	\$6
GC	Kenneth				
8(34)	Rowlands	8/27/98	9/2/98	9/21/98	15

This time, Farrell added to his application, "I'm willing to start at the bottom & work my way up the merit system"—indicating a longtime relationship.

Nonunion applicant Krupenya, with no electrical training or experience, was hired full time at the entry level (Tr. 562–564). Tambe testified he hired Rowlands as a journeyman because he had over 20 years in an "industrial setting" and "was the most qualified applicant that I could choose from" in that 30-day period—ignoring the union applications, which were supposed to be open. He explained that Rowlands worked for a company "associated with Saunders Manufacturing," which his company wired, and "My job foreman on that job, Rusty Dunn, came back to the office and told me that this gentleman was looking to make a job change." There is no evidence that Rowlands had any electrical apprenticeship training to qualify him to be a journeyman with journey workers papers. (Tr. 565.)

I find that the Company has failed to sustain its burden of showing that it would not have hired Hynes and Farrell during the 30-day period even in the absence of their union activity or affiliation, because by hiring them, the Company would have had skilled, productive journeymen at no additional cost, would have saved training expense, and would have journeymen with the required journey workers papers to be eligible to train apprentices to work at apprentice rates on prevailing wage jobs.

Exhibit	Name	Apply Date	Hire Date	Start	Pay
GC 7(32)	Michael Farrell	9/10/98			
GC 7(33) GC	James Hynes	9/10/98			
8(32)	Robert Buck	9/15/98	9/15/98	9/15/98	\$6

Nonunion applicant Buck, with no electrical training or experience, was hired full time at the entry level.

I find that the Company has failed to sustain its burden of showing that it would not have hired either Farrell or Hynes instead of Buck even in the absence of their union activity or affiliation, because by hiring either of them, the Company would have had a skilled, productive journeyman at no additional cost, would have saved training expense, and would have a journeyman with the required journey workers papers to be eligible to train apprentices to work at apprentice rates on prevailing wage jobs.

Exhibit	Name	Apply Date	Hire Date	Start	Pay
GC					
7(34)	Michael Farrell	10/8/98			
GC					
7(35)	Gregory Post	10/8/98			
GC					
7(36)	James Hynes	10/9/98			
GC					
8(33)	Paul Fimbel	10/7/98	10/22/98	11/2/98	\$6

In Post's application, he cited his 5-year electrical apprenticeship with IBEW and his special qualifications, "Aerial lifts, hydraulic benders, 11 years experience in the electrical field" and stated, "I feel that I would make a good addition to your firm by working hard and intelligently out in the field and would be willing to start at minimum wage and work my way up."

Nonunion applicant Fimbel had taken a 2-year BOCES course in electrical, plumbing, and heating, but had never worked as an electrician. He was hired full-time at the entry level. (Tr. 564–565.)

I find that the Company has failed to sustain its burden of showing that it would not have hired Farrell, Post, or Hynes Fimbel even in the absence of their union activity or affiliation, because of the same reasons.

Exhibit	Name	Apply Date	Hire Date	Start	Pay
GC					
7(37)	Michael Farrell	11/9/98			
GC					
7(38)	Gregory Post	11/9/98			
GC 8					
37)	Jermaine Wynn	11/30/98	11/30/98	12/7/98	\$6
GC					
8(38)	Carnell White	11/30/98	11/30/98	12/7/98	6

Nonunion applicants Wynn and White had high school electrical training at Edison Tech and did coop work at a nonunion electrical contractor. Their instructor asked Tambe to put them to work, specifically asking if Tambe could put White to work to "see how he's fitting into the electric industry" (Tr. 565–568). They were hired full time at the entry level, but they worked only 1 hour when they reported on December 7, 1998 (GC Exh. 4A). Yet the Company did not hire Farrell and Post to fill the jobs.

I find that the Company has failed to sustain its burden of showing that it would not have hired Farrell and Post during the 30-day period even in the absence of their union activity or affiliation, because by hiring them, the Company would have had skilled, productive journeymen at no additional cost and would have journeymen with the required journey workers papers to be eligible to train apprentices to work at apprentice rates on prevailing wage jobs.

Concerning applications submitted by union members in the winter and spring months:

- (a) Three union members, *Michael Farrell, James Hynes, and Gregory Post*, filed applications on *December 9, 1998* (GC Exhs. 7(39) to 7(41))—but the nonunion applicants were hired part-time or as a relative.
- (b) Five union members, *Michael Farrell, Gregory Post, Robert Cook, Timothy Jobes*, and *David Johnson*, filed applications on *January 11, 1999* (GC Exhs. 7(42) to 7(46B))—but no nonunion applicants were hired in the 30-day period.
- (c) Five union members, *Michael Farrell, James Hynes, Gregory Post, Robert Baker*, and *Dan Hiler*, filed applications on *February 10, 1999* (GC Exhs. 7(47) to 7(51))—but the only nonunion applicant hired was a former employee in good standing.
- (d) Seven union members, *Michael Farrell, James Hynes, Gregory Post, Scott Galliford, Thomas Maier, Richard Messmer*, and *Jeffrey Sizer*, filed applications on *March 11, 1999* (GC Exhs. 7(52) to 7(60))—but no non-union applicants were hired in the 30-day period.
- (e) Eight union members, Michael Farrell, Gregory Post, Robert Alexander, Donald Cleere, George Paul, Todd Spanganberg, Mark Van Cuyck, and Christopher Wheeler, filed applications on April 8, 1999 (GC Exhs. 7(61) to 7(69))—but the nonunion applicants were hired part-time or as a relative.
- (f) Seven union members, Michael Farrell, Gregory Post, Rustin Bennett, Stephen Gloss, James Incavo, Phillip Ponce, and Robert Salters, filed applications on May 10 and two, James Hynes and Gerald LaPlant, on May 11, 1999 (GC Exhs. 7(70) to 7(79))—but the nonunion applicants were hired part-time, as summer help, or as a relative.
- (g) Four union members, *Michael Farrell, James Hynes, Gregory Post*, and *Justin Knauf*, filed applications on *June 9, 1999* (GC Exhs. 7(80) to 7(83))—but the non-union applicants were hired part-time, as summer help, as a relative, or as former employees in good standing.

I therefore find that Tambe would not have hired any of the union members who applied during those winter and spring months even in the absence of their union activity or affiliation.

Exhibit	Name	Apply Date	Hire Date	Start	Pay
GC 7(84) GC	Gregory Post	7/8/99			
7(85) GC	James Hynes	7/8/99			
7(86) GC	Michael Farrell	7/13/99			
8(64) GC	Richard Valvo	7/15/99	7/15/99	7/26/99	\$7.50
8(68)	Kevin LaRocco	8/5/99	8/5/99	8/23/99	6

Both nonunion applicants were hired full time at the entry level. Valvo had some BOCES electrical training in high school, but no electrical experience. Tambe testified that he was "kind of related," through my uncle's wife's family, but that was not given as a reason for hiring him. LaRocco had some BOCES electrical, plumbing, and heating training in high school, but no electrical experience.

I find that the Company has failed to sustain its burden of showing that it would not have hired two of the three union applicants, Post, Hynes, and Farrell, during the 30-day period even in the absence of their union activity or affiliation, because by hiring them, the Company would have had skilled, productive journeymen at no additional cost, would have saved training expense, and would have journeymen with the required journey workers papers to be eligible to train apprentices to work at apprentice rates on prevailing wage jobs.

Exhibit	Name	Apply Date	Hire Date	Start	Pay
GC 7(87)	James Hynes	8/5/99			
GC 7(88) GC	Gregory Post	8/5/99			
7(89) GC	Michael Farrell	8/12/99			
8(70) GC	Joe Snavely	8/17/99	8/17/99	8/23/99	\$12.25
8(71) GC	Senad Sakanovic	8/18/99	8/18/99	8/23/99	10
8(72) GC	Jason Garrison	8/24/99	8/24/99	8/30/99	7
8(73)	Shawn Teeter	8/24/99	8/24/99	8/30/99	7

Tambe testified that nonunion applicant Snavely, who had some electrical experience, was hired as an electrical apprentice. Snavely, however, was not enrolled in either the Company's State-certified apprenticeship program or its unauthorized program. (Tr. 578; R. Exh. 11.) Nonunion applicant Senad Sakanovic had training and experience in electrical work in Croatia and Bosnia and came through the Family Learning Center, where immigrants learn English (Tr. 420, 457). Nonunion applicants Garrison and Teeter, with no electrical training or experience, were hired full-time at the entry level. Tambe testified that both Garrison and Teeter *knew* a company employee (Tr. 574–575).

I find that the Company has failed to sustain its burden of showing that it would not have hired Hynes, Post, and Farrell during the 30-day period even in the absence of their union activity or affiliation, because by hiring them, the Company would have had skilled, productive journeymen at no additional cost, would have saved training expense, and would have journeymen with the required journey workers papers to be eligible to train apprentices to work at apprentice rates on prevailing wage jobs.

Exhibit	Name	Apply Date	Hire Date	Start	Pay
GC 7(90) GC	Robert Baker	9/7/99			
7(91) GC	Michael Farrell	9/7/99			
7(92)	James Hynes	9/7/99			

GC					
8(75)	Michael Viti	9/8/99	9/8/99	9/27/99	\$10
GC					
8(76)	Frederick Davis	9/14/99	9/14/99	9/28/99	7
GC					
8(77)	Konstantin Vykhrist	9/21/99	9/22/99	9/27/99	6
GC					
8(78)	Aleksandr Soroka	9/21/99	9/22/99	9/27/99	6
GC					
8(80)	Fred Legno	9/27/99	9/27/99	10/4/99	9

Union member Baker stated in his application, "Willing to start at the bottom and work my way up through the system."

Nonunion applicant Viti, with no electrical training and little electrical experience, was hired full time at the entry level (Tr. 579). Nonunion applicant Davis, with high school electrical training but no experience, was hired full time at the entry level. Nonunion applicant Vykhrist, with some electrical training and experience in Mondova, was hired full time at the entry level. Nonunion applicant Soroka from Mondova, with no electrical training or experience, was hired full time at the entry level. Nonunion applicant Legno knew company employee David Osborn, who recommended him, although Legno had no electrical training and little electrical experience. He was hired to work full time at the entry level. (Tr. 581.)

I find that the Company has failed to sustain its burden of showing that it would not have hired Baker, Farrell, and Hynes during the 30-day period even in the absence of their union activity or affiliation, because by hiring them, the Company would have had skilled, productive journeymen at no additional cost, would have saved training expense, and would have journeymen with the required journey workers papers to be eligible to train apprentices to work at apprentice rates on prevailing wage jobs.

Exhibit	Name	Apply Date	Hire Date	Start	Pay
GC					
7(93)	Robert Baker	10/7/99			
GC					
7(94)	Carmen Cinanni	10/7/99			
GC					
7(95)	Robert Cordy	10/6/99			
GC 7(96)	Dennis Cozan	10/7/99			
GC	Dennis Cozan	10/1/99			
7(97)	Michael Farrell	10/7/99			
GC					
7(98)	Robert Griffo	10/7/99			
GC					
7(99)	James Hynes	10/7/99			
GC 7(100)	Gregory Post	10/7/99			
GC	Gregory Fost	10///99			
8(81)	Martin Hoag	10/14/99	10/14/99	10/25/99	\$8
GC					
8(82)	Leonard Hayes	10/18/99	10/18/99	10/19/99	10
GC					
8(84)	Anthony Geraci	11/2/99	11/2/99	11/3/99	11

Nonunion applicant Hoag, although recommended by Tambe's relative Michael Russell and Foreman Tim Woods who lived near him, had no electrical training or any electrical experience except assisting electricians. He was hired full time at the entry level. (Tr. 581–582.) Nonunion applicant Hayes, with some BOCES plumbing, heating, and electric training and

limited experience, was hired full time at the entry level (Tr. 582). Nonunion applicant Geraci was recommended by Foreman Paul McGurk, although Geraci had no electrical training or experience. Tambe hired him full time at the entry level, but paid him \$11 an hour (a dollar more most of the entry-level employees) because of his 6 years experience in the roofing and siding business. (Tr. 456, 582–583.)

I find that the Company has failed to sustain its burden of showing that it would not have hired three of the union applicants, Robert Baker, Carmen Cinanni, Robert Cordy, Dennis Cozan, Michael Farrell, Robert Griffo, James Hynes, and Gregory Post, during the 30-day period even in the absence of their union activity or affiliation, because by hiring them, the Company would have had skilled, productive journeymen at no additional cost, would have saved training expense, and would have journeymen with the required journey workers papers to be eligible to train apprentices to work at apprentice rates on prevailing wage jobs.

Exhibit	Name	Apply Date	Hire Date	Start	Pay
GC 7(101) GC	James Hynes	11/4/99			
7(102)	Michael Farrell	11/4/99			
GC 8(85)	Scott Miller	11/18/99	11/18/99	12/1/99	\$18
GC 8(86)	Joseph Palazzo	11/23/99	11/23/99	12/2/99	18

Tambe hired nonunion journeymen Miller and Palazzo without interviewing either union journeyman Hynes or Farrell. Both Miller and Palazzo had been working through a temporary referral agency for 3 months, since August 1999. The General Counsel has not alleged that the Company had unlawfully utilized the temporary agency in August instead of hiring Hynes and Farrell, both of whom filed applications in August. (Tr. 583–584, 586, 643–644.)

Even so, when Tambe hired journeyman Miller in November, he was depriving the Company of a needed journeyman with journey workers papers, which either union journeyman Hynes or Farrell would have provided the Company because of their IBEW apprenticeship training. There is no showing that Miller possessed journey workers papers required by the State Department of Labor for a journeyman to be eligible to give onthe-job training to any additional apprentice enrolled in the Company's State-certified apprenticeship program.

The Company, however, has shown that Palazzo is a journeyman with journey workers papers, because the resume attached to his application, which the Company provided the General Counsel, reveals that Palazzo had been a member of Local 86 from 1990 until 1997.

I find that the Company has failed to sustain its burden of showing that it would not have hired Hynes or Farrell instead of Miller even in the absence of their union activity or affiliation, because by hiring one of them, the Company would have had a journeyman with the required journey workers papers to be eligible to train apprentices to work at apprentice rates on prevailing wage jobs.

Exhibit	Name	Apply Date	Hire Date	Start	Pay
GC 7(104) GC	Michael Farrell	12/6/99			
7(105) GC	James Hynes	12/6/99			
8(87)	Brian Ferrante	12/15/99	12/15/99	12/20/99	\$7
GC 8(88)	James Kelley	1/3/00	1/3/00	1/10/00	8.50

Nonunion applicant Ferrante, with no electrical training or experience, and nonunion Kelley, with 2 years of BOCES carpentry and electrical training (Tr. 588–589), were hired full-time at the entry level. Ferrante was a "no-show," not appearing for work on his start date (Tr. 491), yet the Company did not hire either Farrell or Hynes to fill the job.

I find that the Company has failed to sustain its burden of showing that it would not have hired Farrell and Hynes during the 30-day period even in the absence of their union activity or affiliation, because by hiring them, the Company would have had skilled, productive journeymen at no additional cost, would have saved training expense, and would have journeymen with the required journey workers papers to be eligible to train apprentices to work at apprentice rates on prevailing wage jobs.

Exhibit	Name	Apply Date	Hire Date	Start	Pay
GC 7(106)	Michael Farrell	1/5/00			
GC 7(107) GC	James Hynes	1/5/00			
8(90)	Peter Krupenya	1/6/00	1/6/00	1/11/00	\$6.50
GC 8(91)	Brian Jurewicz	1/10/00	1/10/00	1/15/00	6
GC 8(92)	Richard Marsh	1/11/00	1/11/00	1/12/00	8
GC 8(93)	Colin Sick	1/13/00	1/13/00	2/7/00	7.50
GC 8(94)	Robert Berry	1/25/00	1/25/00	2/7/00	10
GC 8(95)	Charles Drown	1/25/00	1/25/00	1/31/00	7.50
GC 8(96)	Robert Murphy	1/31/00	2/2/00	2/3/00	14
GC 8(97)	Jeffrey Chiara	2/1/00	2/1/00	2/7/00	10
~(~ .)			_, _, 00	00	- 0

Nonunion applicant Krupenya (brother of an employee), Robert Berry, Charles Drown, and Jeffrey Chiara (brother of an employee), with no electrical training or experience, were hired full-time at the entry level (Tr. 589-591). Nonunion applicant Jurewicz, with BOCES building trades training (recommended by his instructors) and with some electrical experience, was hired full time at the entry level. Nonunion applicant Marsh. with 2 months of BOCES training in basic residential electrical work and no electrical experience, was hired full time at the entry level (Tr. 589-590). Nonunion applicant Colin Sick, with BOCES electrical/heating/plumbing training (recommended by his instructor) and some electrical experience, was hired full time at the entry level (Tr. 590). Nonunion applicant Robert Murphy (recommended by his uncle, an electrical distributor and salesman and longtime acquaintance of Tambe), with 2 years of construction and maintenance training at Alfred State and some electrical experience, was hired full time as a journeyman. None of the entry-level applicants enrolled in either apprenticeship program.

I find that the Company has failed to sustain its burden of showing that it would not have hired Farrell and Hynes during the 30-day period even in the absence of their union activity or affiliation, because by hiring them, the Company would have had skilled, productive journeymen at no additional cost, would have saved training expense, and would have journeymen with the required journey workers papers to be eligible to train apprentices to work at apprentice rates on prevailing wage jobs.

Exhibit	Name	Apply Date	Hire Date	Start	Pay
GC 7(108) GC	Gregory Post	2/7/00			
7(109)	Michael Farrell	2/7/00			
GC 7(110)	James Hynes	2/7/00			
GC 8(98)	Paul Lehman	2/10/00		2/17/00	\$11
GC 8(99)	Jason Thompson	2/24/00	2/24/00	3/6/00	6

Nonunion applicant Thompson, with BOCES electrical/heating/plumbing training (recommended by his instructor) but with no electrical experience, was hired full time at the entry level (Tr. 593). Regarding the hiring of Lehman upon the recommendation of his son-in-law to work in the Ithaca area, Tambe testified: "It may open up my possibility to more out of town work without bringing everybody from Rochester, to have people that are up in the area." Based on this testimony, I find that Tambe would have followed the recommendation, even in the absence of the union organizers' union activity or affiliation.

I find that the Company has failed to sustain its burden of showing that it would not have hired one of the three union applicants, Post, Farrell, or Hynes, instead of hiring Thompson even in the absence of their union activity or affiliation, because by hiring one of them, the Company would have had a skilled, productive journeyman at no additional cost, would have saved training expense, and would have a journeyman with the required journey workers papers to be eligible to train apprentices to work at apprentice rates on prevailing wage jobs.

G. Concluding Findings

The Company's primary defense, belatedly advanced by President Tambe at the trial, was that he did not contact for interview or hire Union Organizers Michael Farrell, James Hynes, Gregory Post, or any of the other union applicants, because

- (1) They were journeymen, who were not eligible to go through his "apprenticeship program" and "in building my company from the bottom up," the "people I lack are people that . . . I could put through an apprenticeship program."
- (2) That some of those people will go into his State-certified apprenticeship program, where they will be eligible to work on prevailing wage work at apprentice rates, and this "will allow me to be competitive when we get into prevailing wage work." Otherwise, "I am losing a great opportunity to be competitive on a lot of jobs."

(3) That he could not use Farrell, Hynes, or Post or the other union journeymen because "I couldn't use them [as apprentices] on these prevailing wage jobs." Therefore, "it would shrink the size of my company and the amount of people I could put in different positions on jobs."

The evidence reveals that this defense is unfounded.

Not only was Tambe still hiring nonunion journeymen, but very few of the nonunion employees he hired were ever enrolled in either of the Company's two apprenticeship programs, its State-certified program or its unauthorized program. Instead of his putting the new employees "through an apprenticeship program," he was requiring them to pay the full tuition of \$650 a semester (\$1300 a year) for the apprenticeship classroom instruction—one-half of which the Company pays if their grade is 80 or higher. As a result, most of the Company's new employees who remain do not enroll in an apprenticeship program. They continue to work without classroom instruction.

Regarding placing more apprentices in the State-certified apprenticeship program, to have available qualified apprentices who could work at apprentice rates on future prevailing wage jobs, Tambe completely ignored the strictly enforced requirement by the State Department of Labor that apprentices in the State-certified program must be trained by journeymen with journey workers papers (such as the union journeyman applicants) with a ratio of three journey workers to one apprentice. Neither journeymen trained in the Company's unauthorized apprenticeship program nor his journeymen who have never received training in an apprenticeship program are qualified to give on-the-job training to apprentices in the State-certified program.

Tambe refused to reveal how many journeymen with journey workers papers he employs. When asked whether his journeymen had gone through the State-certified program, he gave the evasive answer, "When you look at the apprenticeship program the way I do, it's all one program. They all get the same schooling."

Earlier he stated that he would venture that "15 or 20" of the journeymen who have gone through his State-certified apprenticeship program "have stayed with me." This is obviously false testimony. That program had been approved in 1991, and in the 8 or 9 years since then, he had no more than four or five apprentices in the program at any one time. No more than five apprentices could have completed the 5-year program in that length of time.

Ian Miller, who was one of the four apprentices in the program in 1998 and 1999 and who completed his training in the fall '99 semester, left the Company on January 6, 2000. Therefore no more than four apprentices (not 15 or 20) could have completed the training and "stayed with" Tambe.

When another apprentice (John Holliday) left the State-certified program in fall of 1998, he had been replaced with another apprentice (Rick Sweazy) in January 1999. But when Miller completed his training in the fall '99 semester, leaving only three apprentices in the program, he was not replaced. In the meantime, four of the Company's journeymen were terminated in 1999. The evidence does not reveal whether the Company still had a sufficient number of journeymen with journey workers papers for the State Department of Labor to approve

the enrollment of a fourth apprentice in the program in the spring '00 semester that began January 18, 2000.

As found, Tambe admits that "There is a percentage of people that had never went to school and they came up through the ranks and just caught on without school," that some journeymen have not gone through an apprenticeship program, and "I have people that are making over \$22 an hour that have never gone through an apprenticeship program."

Because of Tambe's refusal to reveal how many journeymen with journey workers papers he employs—giving instead evasive and false testimony—I have inferred that the Company was not employing enough journeymen with journey workers papers to meet the State Department of Labor's strictly enforced requirement of three journey workers to each apprentice for any more than four or five apprentices in the Company's State-certified program.

Therefore, Tambe's claim that he did not contact for interview or hire any of the union applicants because they were journeymen is a pretext. To the contrary, the Company was required to employ more journeymen with journey workers papers (such as the union journeymen, trained in a State-approved apprenticeship program) before it could get approval of the State Department of Labor to enroll additional apprentices in the State-certified program.

I find, as required in *FES*, 331 NLRB 9, 12 (2000), that the General Counsel has sustained his burden, set forth in *Wright Line*, to show that the Company was hiring, that the union applicants had the training and experience relevant to the positions for hire, and that union animus contributed to the company decision not to hire the applicants.

As discussed above in analysis, the burden has shifted to the Company to show that it would not have hired the union applicants even in the absence of their union activity or affiliation.

As found, the Company has failed to sustain that burden as applied to Union Organizers *Michael Farrell* and *James Hynes*—after they applied for any position, from entry level to journeyman, at the Company's nonunion wages or whatever the Company was willing to pay—on the following dates for two or more open positions: 6/16/98, 7/15/98, 8/17/98, 8/5/99, 9/7/99, 12/6/99, and 1/5/00 and on other dates when they applied alone, or with others, for one or more open positions.

The Company has failed to sustain that burden as applied to Union Organizer *Gregory Post* when he applied with *Farrell* and *Hynes* for one open position on 10/8/98 and 2/7/00; with *Farrell* for two open positions on 11/9/98; with *Hynes* on 7/8/99 (and *Farrell* who applied on 7/13/99) for two open positions; with *Hynes* on 8/5/99 (and *Farrell* who applied on 8/12/99) for four open positions; with *Farrell*, *Hynes*, and *Robert Baker* for five open positions on 9/7/99; and with *Farrell*, *Hynes*, and *Baker*, as well as with *Carmen Cinanni*, *Robert Cordy*, *Dennis Cozan*, and *Robert Griffo*, for three open positions on 10/7/99.

The Company has failed to sustain that burden as applied to union member *Robert Baker* when he applied with *Farrell* and *Hynes* on 9/7/99 and with *Farrell, Hynes, Post*, and the four others on 10/7/99, for three open positions.

The Company has failed to sustain that burden as applied to Carmen Cinanni, Dennis Cozan, and Robert Griffo, who ap-

plied on 10/7/99 and Robert Cordy who applied on 10/6/99, along with Farrell, Hynes, Post, and Baker, for three open positions

As found, on each of these 14 occasions, the Company has failed to sustain its burden of showing that it would not have hired one or more of the union applicants for one or more open positions even in the absence of their union activity or affiliation and therefore has violated Section 8(a)(3) and (1) of the Act

I find that the Company must offer immediate instatement and backpay to *Michael Farrell* and *James Hynes*, whom it discriminatorily refused to hire beginning June 16, 1998; to *Gregory Post*, whom it discriminatorily refused to hire beginning October 8, 1998; and to *Robert Baker*, whom it discriminatorily refused to hire beginning September 7, 1999.

Regarding the Company's obligation to offer immediate reinstatement to *Carmen Cinanni, Dennis Cozan*, and *Robert Griffo*, who applied with *Farrell, Hynes*, and *Post* on October 7, 1999, and to *Robert Cordy*, who applied on October 6, 1999, there were only three open positions, which the Company discriminatorily filled by hiring nonunion applicants. As found, by that time, the Company had repeatedly and discriminatorily refused to hire *Farrell, Hynes, Post*, and *Baker*.

I find that the Company must be ordered to offer immediate instatement and backpay to three of the four union applicants, *Cinanni, Cordy, Cozan*, and *Griffo*, whom the Company had not discriminatorily refused to hire previously—the identity of the three applicants being determined, if necessary, in a compliance proceeding.

Regarding those union applicants who are not to be ordered instated with backpay because there were no open positions for which they would have been hired in the absence of union animus, the Board held in *FES*, above, 331 NLRB at 16, that an employer "violates Section 8(a)(3) if it refuses to consider union applicants for employment even if there are no openings at the time of application."

Accordingly I find that the Company violated Section 8(a)(3) and (1) by discriminatorily refusing to consider for employment those union applicants who applied when there were no open positions for which they would have been hired in the absence of union animus.

Regarding an appropriate refusal-to-consider remedy for this unlawful conduct, the Board further held in *FES* (supra at 16–17) that it is appropriate to consider whether, "had the applicant entered the pool [of applicants for future job openings] at the time of application, he or she would have been hired for a job that subsequently opened up."

The evidence in this case is clear that when there is no open position within a 30-day period after either a union or nonunion person applies, the applicant would not be "hired for a job that subsequently opened up." The evidence supports the Company's contention in its brief (at 8) that "the Company has a longstanding hiring policy which limited consideration of applications to a 30-day period, and applicants needed to reapply after 30 days from their application if they were still interested in employment opportunities." As Tambe testified, "I only review applications that are on file for 30 days. Past 30 days, I don't review an application, It goes into a dead file" (Tr. 603).

I therefore find that under the circumstances of this case, an appropriate remedy for the unlawful refusal to consider for employment the union applicants who applied when there were no open positions in the 30-day period is limited to a cease-and-desist order.

CONCLUSIONS OF LAW

- 1. By discriminatorily refusing to consider for employment members of Local 86, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.
- 2. By discriminatorily refusing to hire union applicants Michael Farrell and James Hynes since June 16, 1998; Gregory Post since October 8, 1998; Robert Baker since September 7, 1999, and three of the following four union members, Carmen Cinanni, Robert Cordy, Dennis Cozan, and Robert Griffo, since October 7, 1999—the identity of the three applicants being

determined, if necessary, in a compliance proceeding—the Company violated Section 8(a)(3) and (1).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily refused to hire seven union applicants, it must offer them instatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of refusal to hire and date of proper offer of instatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]